



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Department of Natural
Resources' Decision Regarding the City of
Clintonville's Notice of Intent to Apply for the
Land Recycling Loan Program

Case No.: IH-02-08

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The City of Clintonville submitted a Notice of Intent to Apply (ITA) with the Department of Natural Resources for the Land Recycling Loan Program, for funding to remediate its municipal solid waste landfill. The Department denied the City's ITA on May 30, 2002.

On July 1, 2002, the Department received a petition for a contested case hearing pursuant to Wis. Stat. § 227.42, from Attorney Timothy J. Schmid, on behalf of the City of Clintonville. On July 19, 2002, the Department granted a contested case hearing pursuant to Wis. Stat. § 227.42, limited to the following issues:

1. Was Petitioner's Notice of Intent to Apply for the Land Recycling Loan Program, for a landfill remediation project in the City, submitted to the DNR by the filing deadline of December 31, 2001?
2. If the answer to question #1 is no, should DNR have granted a waiver to Petitioner for failing to submit the ITA by the filing deadline of December 31, 2001?

On September 10, 2002, the Division of Hearings and Appeals received a Request for Hearing from the Department.

Pursuant to due notice hearing was held at Waupaca, Wisconsin, on October 17, 2002, and on November 15, 2002, in Madison, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge, presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

City of Clintonville, by

Attorney Timothy J. Schmid
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Shawano, WI 54166

Wisconsin Department of Natural Resources, by

Attorney Judith Mills Ohm
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. The City of Clintonville is a municipality organized under the laws of the State of Wisconsin and located within Waupaca County.

2. The City of Clintonville (the City) is responsible for a closed municipal solid waste landfill which is in need of remediation. Volatile organic compounds (VOC's) were detected in the groundwater, and explosive gas has been detected in areas outside the landfill boundaries. In October 2001, a remedial action plan was prepared to evaluate alternatives for control of gas migration and to bring the site back into compliance with state groundwater standards. (Ex. 1)

3. In connection with the site cleanup, the City sought funding from the Land Recycling Loan Program (LRLP) of the DNR Bureau of Community Financial Assistance. Unfortunately, there is no record that the Notice of Intent to Apply for an LRLP loan was received by the deadline of December 31, 2001.

4. The City retained an engineering and environmental consulting firm, Foth and Van Dyke, in connection with both the remedial action plan and the Notice of Intent to Apply for LRLP funds. The Grant and Loan Coordinator for Foth and Van Dyke, JoAnn Taylor, was directly responsible for sending out the Notice of Intent to Apply for the City. (Ex. 2)

Ms. Taylor testified that on December 19, 2001, she put the Notice of Intent to Apply (ITA) materials in the mail bin at Foth and Van Dyke's Madison office. Foth and Van Dyke regularly makes use of a mail courier, Dunham Express, to pick up mail and deliver it to the U.S. Post Office. Further, Taylor testified that she also sent copies to both the City of Clintonville and the Foth and Van Dyke Green Bay office on December 19, 2001.

5. Ms. Janis Kesy, a geologist in the Green Bay office of Foth and Van Dyke, testified that she received a copy of the Clintonville ITA on about December 21, 2001. The City of Clintonville Public Works Manager, Michael McCord, testified that he received a copy of the ITA on or about the same date. Both of these witnesses were credible, and corroborated the credible testimony of Ms. Taylor that she mailed the ITA on December 19, 2001. Ms. Taylor has been responsible for preparing and mailing ITA's for municipalities for seven years. Over that time, she has prepared 100 or more ITA's and submitted them to the DNR. She has never sent any of the ITA's by certified mail. All of these ITA's have been received in a timely manner by the DNR. The greater weight of the credible evidence supports a finding that Ms. Taylor did mail the ITA to the DNR on December 19, 2001. A reasonable inference is that the ITA was misplaced or mishandled by either the courier service, the U.S. Post Office, or the DNR. It is not known if the ITA was ever "deposited in the U.S. Mail" within the meaning of § 891.46.

6. The DNR staff processing the ITA's for the Land Recycling Program were also credible and testified that they never received the City of Clintonville ITA. The only testimony which remotely suggested a mishandling of the ITA was the coincidence that Ms. Jody Armstrong, whose regular duties include the initial processing of the ITA's for DNR, was not working on December 21, 2001. This is the exact date that the ITA would have been most likely to be received by the DNR. However, Ms. Armstrong testified that she had a very thorough back-up plan in place when she was not working. This included a policy folder specifically directing Land Recycling ITA's to Dan Olson. (Ex. 12) Accordingly, there is no basis in the record to conclude that DNR lost the ITA.

7. Dan Olson maintains the database for the DNR which keeps track of all incoming ITA applications for the Land Recycling Loan Program. The DNR does not acknowledge receipt of each individual ITA as it is received, but instead sends out a mass mailing after the fiscal year deadline has passed. Mr. Olson testified that it would be a feasible better practice to respond to ITA's as they were received, thus giving municipalities and consultants time to become aware of mailing or processing errors.

8. In early May 2002, Foth and Van Dyke became aware of the fact that the City of Clintonville was not listed on the LRLP Project Priority Funding List. Ms. Taylor placed a call to Maureen Hubeler at the DNR to inquire as to why the City was not so listed. The City was informed that the ITA request had not been received by the December 31, 2001 deadline. On May 1, 2002, Ms. Taylor forwarded a copy of the ITA to Ms. Hubeler.

9. On May 13 and 14, 2002, telephone conference calls were held between the DNR, the City and representatives of Foth and Van Dyke. On May 16, 2002, the City, by Stephen Marman, a Foth and Van Dyke engineer, formally appealed the DNR's determination not to treat the ITA request as timely. Further, on July 1, 2002, the City filed the instant request for a contested case proceeding. On July 19, 2002, the DNR granted the request for hearing but limited the case to the two issues set forth above.

10. The City of Clintonville application would have placed as the number two project on the DNR's priority list if it were ranked relative to all other ITA's received prior to December 31, 2002. The City project would have been a lower priority than a similar City of Tomah landfill (ranked #1), but a higher priority than the City of New Richmond (ranked #3 on the FY 2002/03 remediation ranking). Ex. 10

11. The City has filed a loan application. If the City's request to waive the statutory deadline is granted, the City would have to close on the loan by December 31, 2003. Taken as a whole, the greater weight of the evidence supports a finding that this timetable could be accomplished by the City and its consultants. If the City's request for waiver is denied, the May 1, 2002, submittal would be considered for the next fiscal year. The City would receive the same priority score, but not necessarily the same priority ranking because it is not known what other municipal projects will submit ITA's this year. Further, it is unknown what level of funding will be provided to the Land Recycling Program.

12. The DNR has a written policy guidance to assist staff in considering variance requests. The policy guidance relating to variances to the ITA requirement in place at the time of the City of Clintonville's request was drafted on February 12, 1998.

It provided as follows:

At least one of the following should be set to justify a variance:

1. The project is immediately necessary to meet a compliance schedule or is otherwise needed to avoid or minimize public health or environmental impacts. The area engineer's opinion as to the urgency of the project should determine whether a project meets this criterion. If the project can wait until the following year without adverse environmental consequences, this criterion would not be met.
2. Circumstances out of the municipalities' control result in the need for immediate financing. Examples would include 1) an acceleration of the schedules of other related construction (e.g., roads or bridges) which in turn, causes an unanticipated acceleration of the wastewater construction, or 2) CDBG or Rural Development funding which is unexpectedly inadequate to cover all project costs, either because of reduced funding levels or high bids.

Variances should not be given merely for forgetting to mail the ITA in time or losing the form on one's desk. Nor should variances be given to communities or consultants that demonstrate a pattern of noncompliance with the ITA

requirement. Variances will be good only for the fiscal year for which they are initially issued. (Ex. 12)

With respect to the first factor, the City of Clintonville presented the testimony of Foth and Van Dyke, Senior Technical Consultant Janet Kesy. Ms. Kesy testified that significant “public health” and “environmental” impacts were at stake with respect to the Clintonville landfill remediation plan. First, methane gas has migrated from the landfill and poses a risk of explosion. Gas is a particular hazard at this site because a sewer main is very close to the site and there are people living in homes at risk for explosion directly across from the landfill site. (Id.) Some passive gas venting has already been undertaken, but it is likely that an active gas system will also be needed. (Kesy) Second, groundwater in the area exceeds state standards and must be remediated. Further, a geo-membrane cover is needed to prevent continuing environmental damage from runoff and infiltration by rain and snow. (Id.) In the absence of such cover, leachate is likely to produce ongoing groundwater contamination. (Id.) There was no testimony from the DNR area engineer. As a result, Ms. Kesy provided un rebutted expert testimony that site remediation is necessary to minimize public health and environmental impacts.

13. The variance guidance in place at the time of the Clintonville ITA request does not specifically address the instant situation. The guidance states that “...variances should not be given merely for forgetting to mail the ITA in time or losing the form on one’s desk.” (Ex. 12, emphasis added) There is no evidence here to suggest that the City of Clintonville forgot to mail the ITA, rather the question is whether the ITA was lost in the mail, lost by the courier, or lost by the DNR. The guidance has subsequently been changed, effective July 24, 2002, to make clear that “an error by the Municipality or consultant in processing or mailing the ITA does not constitute good cause for approving a variance.” (Ex. 11)

14. Similarly, the modified 2002-variance guidance, makes it clear that the DNR should consider the impact of granting a variance on another municipality. (Ex. 11) However, the variance guidance in place at the time of the Clintonville variance request did not address this factor. There is no question that granting the variance request will have an impact on other municipalities. In particular, the loan for the City of New Richmond would likely be reduced by \$1,100,000.00, representing the amount of the City of Clintonville project. (Hubeler) This would likely mean that the City of New Richmond would be eligible for 1.8 million dollars next and not the 2.9 million dollars which it is seeking. The City of New Richmond site is a lower priority site under the DNR’s objective ranking criteria. Either New Richmond or the City of Clintonville can apply for Land Recycling Funding in the next fiscal year. Granting of the variance would result in the number 2 priority site being fully funded and the number 3 priority site being partially funded.

15. The DNR has granted numerous variances in instances where ITA’s were received after the statutory deadline as a result of mailing problems. (see: Ex. 13) However, all of the prior variances related to the Clean Water Fund, which does not have the same problems with limited funding as the Land Recycling Program.

16. DNR Bureau of Environmental Loans Project Manager Maureen Hubeler testified that she could not imagine a situation where a variance request should be granted on an ITA submittal that was received after the statutory deadline for the Land Recycling Program. This is troubling given that the statute plainly confers considerable discretion upon the DNR to allow such a variance request made by an eligible applicant. (see: § 281.60(3)(b)) Further, the administrative code permits such variance requests, at least as to nonstatutory requirements. (see: § NR 167.26 Wis. Admin. Code) Finally, as discussed, the DNR has drafted a guidance for interpreting the statute and code. Under these circumstances, it is an “abuse of discretion” to not consider a variance request fairly, i.e., in a manner in which it is conceivable the request could be granted.

17. The greater weight of the credible evidence indicates that the ITA was sent to the DNR but not received by the filing deadline of December 31, 2001.

18. The greater weight of the credible evidence, including unrebutted expert testimony on environmental issues, supports a finding that the DNR should have granted a waiver to the City of Clintonville under all the circumstances in this case.

DISCUSSION

The City of Clintonville project is a high priority project using the DNR’s objective ranking criterion. The City presented unrebutted expert testimony that nearby homes were at risk due to gas migration off the landfill site, and that there was ongoing environmental damage to groundwater in the area. It may be that the passive gas venting already undertaken has reduced the likelihood that neighboring homes will explode. However, if this is true, it is not part of the record before the Division. It would certainly be difficult to explain to the possible victim of such an explosion why the variance request was not granted when the City had acted in good faith to clean up the site and to seek land recycling funding.

Under these circumstances, the City has demonstrated that granting a variance is “in the best interests of the state.” As the City argues, funding this project will likely result in both the number two and the number three priority projects receiving some funding next year. It must be noted that Notice of this hearing was provided to all known other municipalities on the Land Recycling Funding list for the fiscal year. This includes the City of New Richmond, which will drop from #2 to #3 on the priority list. No representatives of the City of New Richmond or any other municipality appeared at hearing although they had a right to do so under Wis. Admin. Code NR 2. Given the uncertain state budget situation, it is in the “best interest of the state” to fund the sites which pose the greatest threat to the environment and human health and safety.

The City of Clintonville has acted responsibly in undertaking cleanup of the landfill site. The City retained an experienced consulting firm to develop a remedial plan and to seek Land Recycling Funding. The City had completed the ITA application in October, 2001, well before the December 31st deadline. The failure of mail delivery was a circumstance beyond the City’s control. The record is not totally clear as to whether the ITA was “deposited in the U.S. mail”, within the meaning of the presumption of mailing statute, § 891.46. However, the use of courier

services is a common practice and numerous businesses rely upon such services to efficiently handle their mail. While the technical elements of the presumption of service by mailing have not been met, the statute does reflect the fact that mail delivery errors can occur and that some benefit of the doubt should be given to parties who have mailed papers with the proper postage.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders in cases relating to the Land Recycling Loan Program pursuant to Wis. Stat. §§ 227.42 and 227.43.

2. A municipality must submit notice of its intent to apply for financial assistance under the Loan Recycling Loan Program at least 6 months before the beginning of the fiscal year in which it will request to receive funding. Wis. Stat. § 281.60(3). The parties agree that date was December 31, 2001 for purposes of this proceeding.

3. The DNR may waive the filing deadline upon the written request of an eligible applicant. Wis. Stat. § 281.60(3)(b). The Department of Natural Resources may approve a variance when it determines that a variance is essential to effect necessary financial assistance action or department objectives where special circumstances make a variance in the best interest of the state. Wis. Admin.Code § NR 167.26(1). In exercising such discretion, the department shall take into account factors such as good cause, circumstances beyond the control of the recipient and financial hardship. A variance is in the best interest of the state, due to the environmental impacts of the landfill remediation site. The failure of mail delivery was beyond the control of the City of Clintonville.

4. The term “may” implies discretion. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. The process must depend upon facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. *Hacker v. DHSS*, 197 Wis. 2d 441, 476, 525 N.W.2d 364 (1995). To state that it is inconceivable that a waiver might be granted where a statute clearly allows for it is an abuse of discretion.

5. Papers authorized to be served by mail are presumed to be served when deposited in the U.S. mail with properly affixed postage. Wis. Stat. § 891.46. It is not known if the ITA of the City of Clintonville was ever deposited in the U.S. mail, although it appears likely it was.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the waiver request of the City of Clintonville be granted, and that the City's ITA request be accepted for the applicable fiscal year.

Dated at Madison, Wisconsin on November 27, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.